

**RECEIVED**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

JAN 11 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	CC Docket No. <u>91-142</u>
	)	
BRAVO CELLULAR	)	File No. 10673-CL-P-579-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 579,	)	
North Carolina 15 - Cabarrus	)	
	)	
CENTAUR PARTNERSHIP	)	File No. 10720-CL-P-631-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 631,	)	
South Carolina 7 - Calhoun	)	
	)	
EJM CELLULAR PARTNERS	)	File No. 10116-CL-P-721-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 721,	)	
Wyoming 4 - Niobrara	)	
	)	
EJM CELLULAR PARTNERS	)	File No. 10567-CL-P-596-A-89
	)	
For facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 596,	)	
Oklahoma 1 - Cimarron	)	

To: The Commission

**MOTION TO STRIKE SO-CALLED PETITION  
FOR RECONSIDERATION**

Centaur Partnership (Centaur) and EJM Cellular, L.L.C. (formerly EJM Cellular Partners)

(EJM), by their attorneys and pursuant to 47 C.F.R. §§ 1.41 and 1.106(g), file their motion to

DC258441\1

No. of Copies rec'd 0+7  
List ABCDE

strike the so-called petition for reconsideration filed by Castle Trust, Orbit Cellular, RSA Cellular Partners, Schuylkill Mobile Fone, Inc., Scott Reardon, Skyline Cellular Partners, Sunrise Trust, Walker Trust and Turnpike Cellular Partners on December 28, 1998 (collectively Castle, et al.). None of the foregoing is now or ever has been a party in the captioned docket, usually referred to as the Risk Sharing litigation. Centaur and EJM suggest that the FCC consider sanctions.

#### A. INTRODUCTION

1. The Castle, et al., petition says that it seeks "reconsideration" of the Wireless Telecommunications Bureau's [WTB] Public Notice of November 27, 1998 (Report No. CWS-99-9), entitled "Clarification Of Grants For Cellular Markets . . ." including the above captioned permittees. As specified in the WTB Public Notice, EJM's construction permits were issued on October 21, 1997, and Centaur's construction permit on January 7, 1998. While Castle, et al., anoint themselves as "Pending Petitioners", they are not parties in the captioned docket, and they have no standing whatsoever.

2. Section 405 of the Communications Act of 1934, as amended, limits the filing of petitions for reconsideration to parties ". . . or any other person aggrieved or whose interests are adversely affected thereby", 47 U.S.C. § 405. An FCC rule tracks this language, 47 C.F.R. § 1.106(b)(1). Castle, et al., has no aggrievement and raises no issue of a defect in the November 27 Public Notice. In a futile effort to obscure their lack of standing, they attempt to piggy back on petitions for reconsideration in the above docket filed by others 18 months ago. Those petitions confer no right on Castle, et al., or anyone else to seek reconsideration after the

statutory deadline.

3. Castle, et al., is aware of these principles from prior faulty missteps in the Risk Sharing litigation. Instead of seeking timely reconsideration within 30 days of the FCC's June 3, 1997, Order, they filed notices of appeal at the U.S. Court of Appeals for the D.C. Circuit. Centaur and EJM, inter alia, moved to dismiss these appeals, and the Court did so because Castle, et al., did not seek timely FCC reconsideration a year and a half ago in July, 1997. Castle, et al., did not seek review of these dismissals by the U.S. Supreme Court, Turnpike Cellular Partners v. FCC, No. 97-1421 (D.C. Cir. 1997) (Attachment 1).

4. In its June, 1997, Order, the FCC granted ten applications, terminated show cause proceedings against seven licensees and revoked one license. With respect to EJM and Centaur, the FCC remanded their applications to the WTB for "... expedited consideration ..." of reaffirmation of certifications previously made about compliance with Louisiana community property laws, 12 FCC Rcd. at 8189. The FCC directed submission to the WTB for ministerial consideration and grant of these applications. Centaur and EJM submitted the requested showings. Thereafter, construction permits were issued to EJM for the Wyoming 4- Niobrara RSA and the Oklahoma 1- Cimarron RSA on October 21, 1997, and to Centaur for the South Carolina 7- Calhoun RSA on January 7, 1998.

#### B. CASTLE, ET AL., LACK OF STANDING

5. None of the Castle, et al., group is a party to the Risk Sharing litigation. None sought timely intervention in 1991, 47 C.F.R. §1.223, nor filed any petition or petitions to deny in 1991, 47 U.S.C. §309(d)(1). Castle, et al., do not explain why they chose not to participate.

They chose not to seek reconsideration of the June, 1997, FCC Order under 47 U.S.C. §405(a). Their appeal directly to the Court of Appeals was dismissed for lack of standing and failure to participate at an earlier stage in the proceeding. See Turnpike Cellular Partners v. F.C.C., *supra*.

6. Castle, *et al.*, now seek relief through a so-called petition for reconsideration without compliance with 47 U.S.C. § 405, and 47 C.F.R. § 1.106(b)(1). In CONN-2 RSA Partnership, a dismissed RSA cellular radio applicant asked the FCC to revoke an RSA authorization. The FCC treated the request as one for informal action under Section 1.41. The FCC held that there was no standing because her claim of injury resulting from grant of the authorization to CONN-2 -- the inability to have her application for the RSA reinstated and considered if the successful applicant was not able to construct the system -- rested on "... a purely speculative course of events resulting in a hypothetical injury." 9 FCC Rcd 3295 (1994). See also Orange Park Florida TV v. FCC, 811 F.2d 664, 670 (D.C. Cir. 1987). Castle, *et al.*, do not allege any adverse effect on any of them, a requirement for non-parties seeking reconsideration under § 405 of the Act and § 1.106(b)(1) of the Rules. The only authority cited by Castle, *et al.*, involved an unconsidered pre-grant petition to deny which has no relevance to untimely reconsideration after grant (see Castle, *et al.*, petition, fn. 2 (p. 2)).

### C. SUGGESTION OF ABUSE OF PROCESS

7. The Acting Chief, WTB, released a Memorandum Opinion and Order on December 31, 1998, in K.O. Communications, Inc., [DA 98-2643], an enforcement proceeding considering allegations of abuse of process for filing of a petition to deny alleging facts previously known by that petitioner for three years. While the Acting Chief concluded that there

was insufficient evidence the petitioner there had an intent to abuse FCC processes, the

Conclusion of the MO&O, states as follows [p. 14]:

31. The Bureau will not tolerate frivolous pleadings or pleadings filed for the purpose of extracting settlements from our licensees and applicants. If the circumstances surrounding the filing of a pleading raise questions concerning abuse of process, we will, as we have done in this case, investigate thoroughly. The Bureau will vigorously follow the Commission's directive to take appropriate enforcement action against frivolous and improper pleadings.<sup>97</sup>

Fn. 97. Commission Takes Tough Measures Against Frivolous Pleadings, 11 FCC Rcd. 3030 (1996).

Section 1.52 of the FCC rules provides in part as follows:

The signature or electronic reproduction thereof by an attorney constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

EJM and Centaur request that the FCC consider the so-called petition for reconsideration as an abuse of process justifying sanctions under 47 C.F.R. §§1.24 and 1.52. Castle, et al., did not intervene in the Risk Sharing proceeding by the deadline more than seven years ago.

Castle, et al., was rejected by the United States Court of Appeals for the D.C. Circuit and did not file a petition for reconsideration on or before July 3, 1997. Castle et al.'s, filing of a so-called petition for reconsideration of a WTB Public Notice "Clarification" to which it raises no objection raises an issue of abuse of process.

Richard S. Myers, Esquire  
Myers Keller Communications Law Group  
Suite 1100  
1522 K Street, N.W.  
Washington, D.C. 20005

Donald J. Evans, Esquire  
Donelan, Cleary, Wood & Maser, P.C.  
Suite 750  
1100 New York Avenue., N.W.  
Washington, DC 20005

Peter Gutmann, Esquire  
Pepper & Corazzini, L.L.P.  
Suite 200  
1776 K Street, N.W.  
Washington, DC 20006

Harry F. Cole, Esquire  
Bechtel & Cole, Chartered  
Suite 250  
1901 L Street, N.W.  
Washington, DC 20036

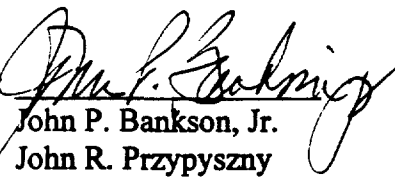
  
Josefina C. Barberena

For the foregoing reasons, we respectfully request that the so-called petition for reconsideration filed by Castle, et al., on December 28, 1998, be stricken forthwith and that the FCC consider sanctions against Castle, et al., for abuse of process.

Respectfully submitted,

CENTAUR PARTNERSHIP

EJM CELLULAR, L.L.C.

By   
John P. Bankson, Jr.  
John R. Przypyszny

Their Attorneys

Drinker Biddle & Reath LLP  
901 Fifteenth Street, NW  
Suite 900  
Washington, D.C. 20005  
(202) 842-8800

January 11, 1999

# **ATTACHMENT 1**



**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 97-1421**

**September Term, 1997**

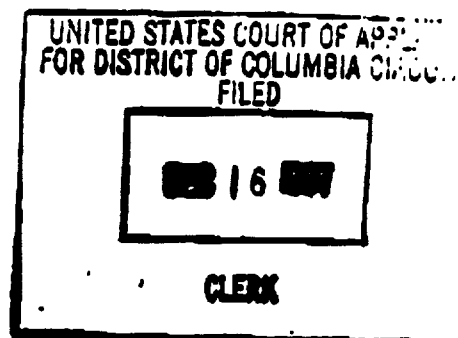
**Tumpike Cellular Partners,  
Appellant**

**v.**

**Federal Communications Commission,  
Appellee**

---

**Alpha Cellular, et al.,  
Intervenors**



---

**Consolidated with 97-1423**

**BEFORE: Ginsburg, Rogers, and Garland, Circuit Judges**

**ORDER**

Upon consideration of the motion to hold in abeyance, the motions to dismiss and the joint opposition thereto, the motion to strike, and the motion to supplement and the response thereto, it is

**ORDERED** that the motion to strike the amended joint response be denied. It is

**FURTHER ORDERED** that the motions to dismiss be granted. Because appellants failed to file a petition for reconsideration before the FCC and were not parties to the administrative proceedings during which the validity of the construction permits and licenses at issue here were challenged before the FCC, they are not entitled to judicial review. See 47 U.S.C. § 405(a); Spanish International Broadcasting Co. v. FCC, 385 F.2d 615, 624-28 (D.C. Cir. 1967). Appellants' arguments that it would have been futile to exhaust their administrative remedies are unpersuasive. See University of District of Columbia Chaire Chapter v. Board of Trustees of University of District of Columbia, 56 F.3d 1469, 1475 (D.C. Cir. 1995). In any event, the parties and the FCC agree that should the Commission's order be overturned, either after the Commission rules on the petition for reconsideration, or through judicial review, the appellants and intervenors on behalf of the FCC will be able to compete for the disputed licenses and permits. It is

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 97-1421**

**September Term, 1997**

**FURTHER ORDERED** that the motion to hold in abeyance be dismissed as moot. It is

**FURTHER ORDERED** that the motion to supplement be granted. The Clerk is directed to file the lodged document.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

*DA*  
*WIR*  
*MS*

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 97-1421**

**September Term, 1997**

Turnpike Cellular Partners,  
Appellant

v.

Federal Communications Commission,  
Appellee

---

Alpha Cellular, et al.,  
Intervenors

---

Consolidated with 97-1423

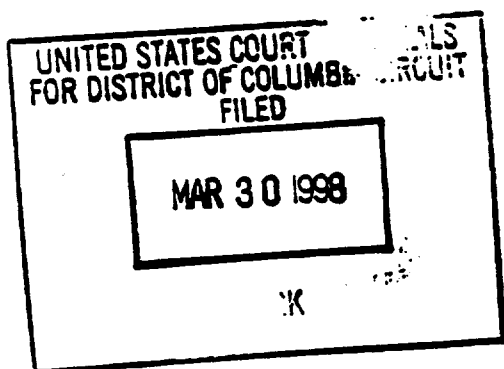
**BEFORE:** Ginsburg, Rogers and Garland, Circuit Judges

**ORDER**

Upon consideration of appellants' petition for rehearing filed January 30, 1998, it  
is

**ORDERED** that the petition be denied.

**Per Curiam**



**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: *Robert A. Bonner*  
Robert A. Bonner  
Deputy Clerk

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 97-1421**

**September Term, 1997**

Turnpike Cellular Partners,  
Appellant

v.

Federal Communications Commission,  
Appellee

---

Alpha Cellular, et al.,  
Intervenors

---

Consolidated with 97-1423

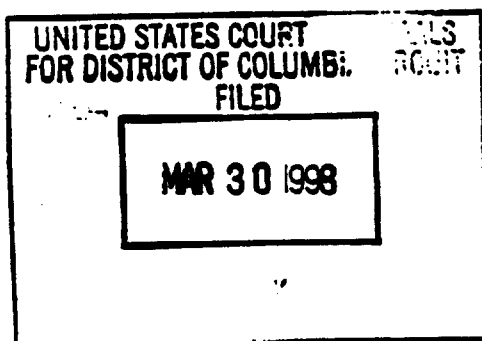
**BEFORE:**

Edwards, Chief Judge; Wald, Silberman, Williams,  
Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel  
and Garland, Circuit Judges

**ORDER**

Upon consideration of appellants' Suggestion for Rehearing In Banc, and the  
absence of a request by any member of the court for a vote, it is

**ORDERED** that the suggestion be denied.



**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: *Robert A. Bonner*  
Robert A. Bonner  
Deputy Clerk

Certificate of Service

I, Josefina C. Barberena, hereby certify that on January 11, 1999, a copy of the foregoing Motion to Strike So-Called Petition for Reconsideration was served by first class U.S. mail, postage prepaid, upon:

\*Gerald P. Vaughan, Esquire  
Acting Chief, Wireless Telecommunications Bureau  
Federal Communications Commission  
Room 5002  
2025 M Street, NW  
Washington, DC 20554

\*Steve Weingarten, Esquire  
Chief, Commercial Wireless Division  
Federal Communications Commission  
Suite 7023  
2100 M Street, NW  
Washington, DC 20554

\*Stephen Markendorff, Esquire  
Wireless Telecommunications Bureau  
Federal Communications Commission  
Suite 8042  
2100 M Street, NW  
Washington, DC 20554

\*John I. Riffer, Esquire  
Associate General Counsel- Adjudication  
Federal Communications Commission  
Room 610  
1919 M Street, N.W.  
Washington, D.C. 20554

\*By Hand

Larry S. Solomon, Esquire  
Shook, Hardy & Bacon LLP  
Market Square West - Suite 600  
801 Pennsylvania Avenue, N.W.  
Washington, DC 20004-2165

Carl W. Northrop, Esquire  
Paul, Hastings, Janofsky & Walker, L. L.P.  
10<sup>th</sup> Floor  
1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2400

Alan Y. Naftalin, Esquire  
Koteen & Naftalin, L.L.P.  
1150 Connecticut Ave., N.W.  
Washington, D.C. 20036

Stephen Kaffee, Esquire  
Suite 700  
733 15th Street, N.W.  
Washington, D.C. 20005

William E. Zimsky, Esquire  
Abadie & Zimsky, L.L.C.  
Suite 303  
813 Main Avenue  
Durango, Colorado 81301

David L. Hill, Esquire  
O'Connor & Hannan, L.L.P.  
Suite 800  
1919 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Barry H. Gottfried, Esquire  
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.  
Suite 400  
2001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006-1851

David J. Kaufman, Esquire  
Brown, Nietert & Kaufman, Chartered  
Suite 660  
1920 N Street, N.W.  
Washington, D.C. 20036

James F. Ireland, III, Esquire  
Cole, Raywid & Braverman, L.L.P.  
Suite 200  
1919 Pennsylvania Ave., N.W.  
Washington, D.C. 20006-3458